Justice Rehnquist: First Amendment Speech in the Labor Context

By ROBERT C. LIND, JR.*

Introduction

William H. Rehnquist, the 100th justice of the United States Supreme Court, is a man with rather predictable judicial tendencies which clearly result from his well defined and articulated jurisprudential beliefs. Though he has written a surprisingly limited number of "traditional" labor law opinions during his tenure on the Supreme Court, those that he has written are consistent with his general legal philosophy. These opinions are a microcosm of Justice Rehnquist's jurisprudence.

It is too simplistic to view Justice Rehnquist as totally result-oriented, voting his political philosophy by deciding against "Big Government" and labor unions at every available opportunity. Although his opinions and voting record have been evaluated so as to show such a pattern in his decisions,[1] this is to be expected from any person operating from a well-defined legal and constitutional

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1. *See* Ulmer & Stookey, *'Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior,'* 3 FLA. ST. L. REV. 331 (1975); Schultz & Howard, *The Myth of Swing Voting: An Analysis of Voting Patterns on the Supreme Court,* 50 N.Y.U.L. REV. 798 (1975); Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293 (1976). "A review of all the cases in which Justice Rehnquist has taken part indicates that his votes are guided by three basic propositions: (1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual; (2) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states; and (3) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against such exercise." *Id.* at 294 (footnotes omitted).

philosophy.

Simple result analysis could possibly permit a study which is result-oriented itself. More properly, an examination of Justice Rehnquist's application of the First Amendment in labor cases must be centered on those elements of his philosophy which come into play in the labor-management relations area.

As will be shown below, the most important elements of Justice Rehnquist's jurisprudence are his consistent focus on federalism, his belief in textual interpretation, and his utilitarian application of the First Amendment in specific contexts.

Federalism in Justice Rehnquist's Labor Opinions

Justice Rehnquist views the Constitution as creating an implicit ordering of relationships within the federal system, an order necessary to make the Constitution a workable governing charter. It is this view which forms the basis of his constitutional philosophy.[2] Justice Rehnquist accepts the view expressed by Chief Justice Marshall in *Marbury v. Madison,*[3] that while the people retain ultimate sovereignty, they have ceded certain well-defined powers to the national government. These powers are strictly proscriptive, consisting of "thou shall not's" rather than "thou shall's." Any other powers have been denied to the national and state governments.[4] This view of the constitutional plan places tension between the national and state governments, as well as between the people and those governments.[5]

Because state and local elected bodies are considered by the Justice as more responsive to the commands of the people, state and local government must be protected from the power of the federal government, of which Justice Rehnquist is wary.[6] It is for this reason that he is reluctant to put restrictions on state power and frequently defers matters to the states,[7] although it cannot be de-

2. *See* Nevada v. Hall, 440 U.S. 410, 432 (1979) (Rehnquist, J., dissenting) (article III and the Eleventh Amendment protect state sovereignty from involuntary suit in a foreign state).

3. 5 U.S. (1 Cranch) 137 (1803).

4. Furman v. Georgia, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting).

5. Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693, 696 (1976).

6. *See* United Steelworkers v. Weber, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting)(Justice Rehnquist begins his dissent with a reference to George Orwell's *1984*).

7. *See, e.g.,* Colautti v. Franklin, 439 U.S. 379, 401 (1979) (White, J., joined by Burger,

nied that the conservatism of state power mirrors his own political philosophy.[8]

These federalist concerns were the basis for Justice Rehnquist's majority opinion in *National League of Cities v. Usery*,[9] which held that the 1974 amendments to the Fair Labor Standards Act,[10] concerning minimum wage and maximum hour provisions, could not be applied to employees of state governments. Such congressional action was seen as an abrogation of an undefined, but unified, constitutional principle guaranteeing the independent existence and sovereignty of state and local governments.

The majority opinion was built upon the rationale of Justice Rehnquist's earlier dissent in *Fry v. United States*.[11] There he argued that the states possess an inherent affirmative constitutional limitation on congressional power which precludes the application of wage-freeze legislation to state employees.

> Both [the Tenth and Eleventh] Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.[12]

In *National League of Cities v. Usery*, Justice Rehnquist continued to assert a kind of "natural law" of states' rights, strongly at odds with his legal positivist philosophy.[13] He held that the stat-

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C.J. and Rehnquist, J., dissenting); Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

8. Justice Rehnquist served as the chief aide to Barry Goldwater during his 1964 Presidential campaign. Address by Robert B. Chatz to the Southern District Regional Members of the Commercial Law League of America (Jan. 1, 1978), *reprinted in* 83 COM. L.J. 121 (1978).

9. 426 U.S. 833 (1976).

10. 29 U.S.C. §§ 201-219 (West Supp. 1980).

11. 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting).

12. *Id.* at 557 (Rehnquist, J., dissenting).

13. It is Justice Rehnquist's philosophy that rights arise only from positive law, constitutional or statutory. "If [a democratic] society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards indeed do take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by the people. Within the limits of our Constitution, the representatives of the people in the execu-

utory amendments to the Fair Labor Standards Act exceeded congressional power under the commerce clause because they directly displaced the states' freedom to structure integral operations in areas of traditional governmental functions, thereby violating the Tenth Amendment.[14] The undefined limitations of state sovereignty were held not to be delegated to the national government.

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.[15]

The Court found that the imposition of minimum wage and maximum hours would significantly alter or displace the states' abilities to structure employer-employee relationships in areas such as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities were held to be typical of those performed by state and local governments in administering the law and furnishing public services.[16]

Justice Rehnquist determined that these traditional functions were of the type which governments were created to provide. The 1974 Fair Labor Standards Act amendments, however, by making some of these functions economically prohibitive, took away the

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tive branches of the state and national governments enact laws. The laws that emerge after a typical political struggle in which various individual value judgments are debated likewise take on a form of moral goodness because they have been enacted into positive law. It is the fact of their enactment that gives them whatever moral claim they have upon us as a society, however, and not any independent virtue they may have in any particular citizen's own scale of values." Rehnquist, *supra* note 5, at 704 (1976). *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting); Paul v. Davis, 424 U.S. 693 (1976).

Justice Stevens has stated the contrary position in Meachum v. Fano, 427 U.S. 215, 229 (Stevens, J., dissenting): "If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source." *Id.* at 230.

14. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

15. 426 U.S. at 845.

16. *Id.* at 851.

state control. "Quite apart from the substantial costs imposed upon the States and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."[17]

It was this impairment of the states' control over traditional functions which concerned the Justice. "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.' "[18]

He therefore propounded an essential function test. Under the test, if regulated state functions are found to be "functions essential to separate and independent existence,"[19] they are considered attributes of state sovereignty which may not be impaired by Congress. The states' power to determine the wages, hours and overtime pay of employees who carry out governmental functions was found to be such an attribute of state sovereignty.

National League of Cities v. Usery proved to be the pinnacle of the Court's acceptance of Justice Rehnquist's view of states' rights. The essential function test has subsequently remained dormant.[20]

Federalism and the NLRB

Justice Rehnquist's strong belief in federalism can be seen in his decisions concerning the National Labor Relations Board. While Justice Rehnquist tends to give a great deal of deference to administrative agencies,[21] he views them within the context of the

17. *Id.* at 847.

18. *Id.* at 851 (citation omitted).

19. *Id.* at 845 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911)).

20. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Rehnquist, J.). In sustaining Congress' power to enforce the equal protection clause under § 5 of the Fourteenth Amendment, a state was held subject to suit for damages for sex discrimination involving state employees under the Equal Employment Opportunity Act of 1972; no consideration was made of the "attributes of state sovereignty."

21. "[A] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts." NLRB v. Boeing Co., 412 U.S. 67, 75 (1973). This deference may be due, in part, to the Justice's interest in administrative law prior to his appointment to the Court. At the time of his nomination he was serving as a member of the Council of the Administrative Conference of the United

constitutional scheme of federalism. This means that the power of the NLRB, as an agency of the federal government, is to be strictly construed.

In several of his labor opinions, Justice Rehnquist attempts to limit the involvement of the National Labor Relations Board. For example, in his first labor opinion, *NLRB v. Burns International Security Services, Inc.*,[22] Justice Rehnquist concurred with the majority's holding that a "successor" employer was not required to assume a collective bargaining agreement reached by the prior employer and the certified union. However, he felt it necessary to dissent from the majority's conclusion that the successor employer, Burns, was under a statutory obligation to bargain with the union, the United Plant Guards. His dissent was grounded on his finding there was no evidence that a majority of Burns' present employees wanted the United Plant Guards as their bargaining representative, or that the particular group of employees constituted the appropriate bargaining unit in light of the fact that Burns regularly transferred employees from job to job and had never bargained with a union consisting of employees at a single location.[23]

Justice Rehnquist attacked the application of the successorship doctrine, which requires the new employer to recognize and bargain with the existing union representative,[24] as inapplicable to the *Burns* case.[25] The Burns Company had successfully bid against the previous supplier of contracted security services. Although Burns retained most of the employees of the previous supplier, Justice Rehnquist maintained that Burns was more of a "competitor" than a "successor," particularly in view of the fact that Burns had acquired no assets, by negotiation or transfer, from the previous employer. He therefore concluded that the successorship doc-

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States and was also a member of the Council of the Section of Administrative Law of the American Bar Association. Rehnquist, *Luncheon with Mr. Justice Rehnquist,* 26 AD. L. REV. 419 (1974).

His expertise was brought to bear in IT&T v. Local 134, International Brotherhood of Electrical Workers, 419 U.S. 428 (1975), where Justice Rehnquist, for a unanimous Court, decided a technical question concerning the adjudicatory and prosecutorial functions of the National Labor Relations Board in a § 10(k) jurisdictional dispute hearing and its compliance with the Administrative Procedure Act.

22. 406 U.S. 272, 296 (1972) (Rehnquist, J., concurring in part and dissenting in part).

23. *Id.* at 297-98 (Rehnquist, J., concurring in part and dissenting in part).

24. *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

25. *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 254-55 (1974).

trine was inappropriate because it would "undercut the principle of free choice of bargaining representatives by the employees and designation of the appropriate bargaining unit by the Board that are guaranteed by the Act."[26]

Because Justice Rehnquist is extremely protective of the constitutionally balanced federal system,[27] he has taken a restrictive view of the National Labor Relations Board's jurisdiction. Although "a judicially perceived need to leave to the National Labor Relations Board the adjudicative development of the law controlling labor relations has resulted in extensive preemption of legislative and judicial state action in the field,"[28] the Justice has generally attempted to limit the scope of preemption in the labor law area.[29]

Another example of Justice Rehnquist's limitation of the NLRB's jurisdiction is found in *NLRB v. Boeing Co.*[30] Justice Rehnquist, writing for the Court, held that the question of whether a fine imposed upon a union member for crossing a picket line was so large as to be coercive was a matter for state courts to determine, upon the basis of the state law of contracts or voluntary associations. The basis for this decision was the lack of congressional concern for the imposition by unions of fines not affecting the employer-employee relationship. "Congress had not intended . . . to regulate the internal affairs of unions to the extent that would be required in order to base unfair labor practice charges on the levying of such fines."[31] Thus, while the NLRB had authority under section 8(b)(1)(A) of the National Labor Relations Act[32] to review

26. 406 U.S. at 310 (Rehnquist, J., concurring in part and dissenting in part). "I believe that a careful analysis of the . . . concept of successorship indicates that important rights of both the employee and the employer to independently order their own affairs are sacrificed needlessly by the application of that doctrine to this case." *Id.* at 299.

27. *See* notes 2-8 and accompanying text *supra.*

28. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 COLUM. L. REV. 623, 635 (1975). This note presents a concise discussion of the history of labor law preemption.

29. Justice Rehnquist has also attempted to limit preemption in other areas. *See, e.g.,* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 640 (1973). Justice Rehnquist, dissenting from the Court's holding that a federal aviation regulation preempted the city's curfew on late night flights, rejected the notion that preemption could be founded upon the implied intent of Congress, stating that a strict intent to preempt on the part of Congress must be shown.

30. 412 U.S. 67 (1973).

31. *Id.* at 73.

32. 29 U.S.C. §§ 151-168 (1980).

the reasonableness of union rules affecting employment status, its general lack of jurisdiction over internal union affairs prohibited its testing of the reasonableness of rules affecting membership status not otherwise prohibited by the Act.

Justice Rehnquist also refused to apply the preemption doctrine against state courts in *Windward Shipping Ltd. v. American Radio Association*[33] and *American Radio Association v. Mobile Steamship Association.*[34] In both cases, Justice Rehnquist, writing for the Court, upheld a state court injunction forbidding peaceful picketing to protest labor standards aboard a foreign vessel with an alien crew in an American port. The preemption arguments were rejected because, although the union activity was directed towards increasing American wage rates by reducing the competitive advantage enjoyed by the owners of foreign flag ships due to low labor costs, Justice Rehnquist found an insufficient showing that the picketing would in any way affect interstate commerce. State jurisdiction was therefore not preempted.

Recent cases continue to demonstrate Justice Rehnquist's propensity for denying jurisdiction to the NLRB. In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission,*[35] Justice Rehnquist joined in Justice Stevens' dissent from the Court's decision striking down as preempted the state regulation of self-help remedies, in this case a concerted refusal to work overtime, which were neither expressly protected nor expressly prohibited by the National Labor Relations Act. The majority held that "Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than the NLRB, for neither States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful.' "[36] The dissent argued that there existed no legislative intent to leave partial strike activity wholly unregulated, nor was there any evidence that Congress had addressed the question of partial strike activity.[37] Justice Stevens concluded his opinion by stating that he was not persuaded that partial strike activity was so essential to the bargain-

33. 415 U.S. 104 (1974).
34. 419 U.S. 215 (1974).
35. 427 U.S. 132 (1976).
36. *Id.* at 149 (citation omitted).
37. *Id.* at 157 (Stevens, J., dissenting).

ing process that the states should be prohibited from making such activity illegal.[38]

Justice Rehnquist also joined Justice Stevens' plurality opinion in *New York Telephone Co. v. New York State Department of Labor*,[39] which held that Congress had intended to leave the states free to decide whether or not strikers should be disqualified from unemployment compensation. In language somewhat reminiscent of *National League of Cities v. Usery*,[40] the Court found that the state provision constituted a law of general applicability which protected interests "deeply rooted in local feeling and responsibility."[41] The law was viewed as comprising part of the federal-state scheme which grants the states considerable discretion in setting eligibility criteria for unemployment benefits.[42] Therefore, it was entitled to a presumption of validity to be overcome only by "compelling congressional direction" to the contrary.[43]

Justice Rehnquist also joined in the Court's opinion in *NLRB v. Catholic Bishop of Chicago*,[44] which held that schools operated by a church, teaching both religious and secular subjects, are not within the jurisdiction of the NLRB. The majority saw a significant risk of the infringement of the free exercise and establishment clauses of the First Amendment if the National Labor Relations Act was found to confer jurisdiction over church-operated schools.

In analyzing the language of the Act and its legislative history, the Court found no affirmative intention by the Congress to grant jurisdiction to the NLRB over church-operated schools. The majority, noting congressional sensitivity to First Amendment guarantees, found that the required explicit congressional intent to infringe upon constitutional rights was not present, therefore,

> [i]n the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the

38. *Id.* at 159 (Stevens, J., dissenting).

39. 440 U.S. 519 (1979).

40. 426 U.S. 833 (1976).

41. 440 U.S. at 540 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)). *See* Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972), for a discussion of the attacks made on *Garmon* and its possible re-emergence.

42. 440 U.S. at 536-40.

43. *Id.* at 540 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

44. 440 U.S. 490 (1979).

> Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.[45]

As has been shown, Justice Rehnquist's view of federalism, as applied to administrative agencies, has become a dominant philosophy influencing many of his opinions concerning labor law. Whether the application of its statutes is limited, as in *Burns*, or its jurisdiction is held not to preempt state law, it is clear that the National Labor Relations Board is to take a nonexclusive role in labor matters.[46]

Textualism in Justice Rehnquist's Labor Opinions

The second element often seen in Rehnquist's jurisprudence is his textualistic view of the Constitution as a restricted grant of power by the holder of ultimate sovereignty, the people. This view pervades his reading of both the Constitution and statutory enactments allowed under that organic document.

Justice Rehnquist believes that the Framers of the Constitution and the Bill of Rights were cognizant of the fact that they were writing an instrument which was to guide the country for centuries. Therefore, they wrote keeping this objective in mind. The specific system the Framers wanted and adopted, and the particular problems they wished resolved, were set forth in specific language which stated explicitly or implicitly[47] their intentions. In areas where the Framers realized that unforeseen matters would have to be dealt with at a later time, they used more ambiguous language.

This view follows the notion of an expandable Constitution ex-

45. *Id.* at 507.

46. *See* discussion of NLRB v. Catholic Bishop of Chicago, notes 44-45 and accompanying text *supra*.

47. *See* Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting). This case involved the issue whether Nevada could be sued unwillingly in the California state courts. Justice Rehnquist discussed the Court's reliance "on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by [the implicit ordering of relationships within the federal system] are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning." *Id.* (footnote omitted).

pounded by Justice Oliver Wendell Holmes, Jr.[48] General language used by the Framers gives to those later interpreting the instrument latitude to apply the language to cases the Framers may not have foreseen. Matters not at all contemplated by the Framers are to be dealt with as questions of first impression. However, when the Framers did not use general language, or when they dealt with a topic of which they were cognizant, the interpretation given by the authors must then be followed.[49]

Specific text within the Constitution and its amendments must be given the full force of its language as understood by the Framers.[50] The explicit enforcement provision of the Fourteenth Amendment,[51] for example, determines the precedence which certain congressional authority takes over state sovereignty.[52]

General text, within Justice Rehnquist's view of constitutional construction, not only allows for a certain amount of latitude in adapting the Constitution to a changing environment, but also allows philosophical differences to come to the fore.

> The Constitution is in many of its parts obviously not a specifically worded document but one couched in general phraseology. There is obviously wide room for honest difference of opinion over the meaning of general phrases in the Constitution; any particular Justice's decision when a question arises under one of these general phrases will depend to some extent on his own philosophy of constitutional law.[53]

There must be limits placed on the interpretations given such general language, however. They must correspond with the purpose of the Framers in using such general or ambiguous language. Justice Rehnquist puts great emphasis on Chief Justice Marshall's interpretation of the Constitution because the latter wrote within the brief interval following the deliberations of the Framers of the Constitution at Philadelphia, and the debates over the ratification

48. *See* Missouri v. Holland, 252 U.S. 416, 433 (1920).

49. Rehnquist, *supra* note 5, at 694.

50. *See* Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191, 1203-04, 1209 (1978) (Justice Rehnquist is described as a textualist, who interprets the text of the Constitution in the light of any clarifying original understanding of the Framers).

51. U.S. CONST. amend. XIV, § 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

52. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56 (1976).

53. Rehnquist, *supra* note 5, at 697. *See also* Rehnquist, *The Supreme Court of the United States: The Ohio Connection*, 4 U. DAYTON L. REV. 271, 280 (1979).

of the Constitution in the thirteen colonies.[54]

Justice Rehnquist also believes that general language should be read with consistency, and preferably with deference to some "central guiding principle."

> If, during the period of more than a century since its adoption, this Court had developed a consistent body of doctrine which could reasonably be said to expound the intent of those who drafted and adopted [the equal protection clause of the Fourteenth Amendment], there would be no cause for judicial complaint, however unwise or incapable of effective administration one might find those intentions. If, on the other hand, recognizing that those who drafted and adopted this language had rather imprecise notions about what it meant, the Court had evolved a body of doctrine which both was consistent and served some arguably useful purpose, there would likewise be little cause for great dissatisfaction with the existing state of the law.
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> Unfortunately, more than a century of decisions under this Clause of the Fourteenth Amendment have produced neither of these results. . . .[T]he Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.[55]

As can be gathered from the dissent quoted above, Justice Rehnquist's insistence upon the strict textual analysis of the Constitution and its amendments has caused him to reject the Supreme Court's current interpretation of the equal protection clause. His interpretation of that clause would require that a rational basis test be used in equal protection cases which deal with classifications based on gender,[56] alienage[57] or illegitimacy,[58] be-

54. Rehnquist, *supra* note 5, at 697.

55. Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

56. *See* Califano v. Goldfarb, 430 U.S. 199, 224 (1977) (Justice Rehnquist dissenting from Court decision which struck down a provision of the Social Security Act requiring a surviving widower to prove his dependency on his deceased wife in order to claim a death benefit, though widows were granted such benefits without proof of dependency on their deceased husbands, stating the view that 'benign' gender classifications must also be analyzed by a mere rationality standard); Craig v. Boren, 429 U.S. 190, 217 (1976) (Justice Rehnquist dissenting from the Court's invalidation of an Oklahoma statute forbidding the sale of 3.2 beer to males aged 18-20, but allowing such sales to women 18 or older, which under his view would have been upheld under a rational basis equal protection analysis. "The only redeeming feature of the Court's opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in Frontiero v. Richardson, 411 U.S. 677 (1973), from their view that sex is a 'suspect' classification for purposes of equal protection analysis." 429 U.S. at 217); Weinberger v. Wiesenfeld, 420 U.S. 636, 655 (1975)(Justice Rehnquist concurred in the result reached by the Court that a Social Security provision

cause the Fourteenth Amendment allows strict scrutiny only for classifications based on race[59] or on national origin, "the first

granting benefits to a spouse of a deceased male wage earner, but not to the spouse of a deceased female wage earner, was constitutionally impermissible, finding that the government's proffered legislative purpose was so totally at odds with the context and history of the statute that it could not serve as a basis for judging whether the statutory distinction between men and women rationally served a valid legislative objective; Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Justice Rehnquist dissenting from the Court's decision invalidating a federal law which entitled married female members of the armed forces to greater financial benefits only if they proved that their spouses were dependent, though imposing no similar requirements on males; he cited the district judge's opinion in Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972), for the proposition that there existed a rational relationship between the classification and a legitimate governmental end); Reed v. Reed, 404 U.S. 71 (1971) (Justice Rehnquist joining a unanimous decision striking down an Idaho law which gave preference to men over women as estate administrators on the ground it did not "bear a rational relationship" to a legitimate state objective). *But see* Califano v. Westcott, 443 U.S. 76, 93 (1979) (Justice Rehnquist joining Justice Powell's opinion concurring in part with the Court's holding that a section of the Social Security Act providing benefits to families whose dependent children lack parental support because of the unemployment of the mother, was not substantially related to the achievement of an important governmental objective, and therefore unconstitutional).

57. *See* Nyquist v. Mauclet, 432 U.S. 1, 17 (1977) (Rehnquist dissenting from the Court's decision holding invalid a New York state law limiting scholarship grants to citizens, and aliens who intended to become citizens); Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Justice Rehnquist dissenting from the Court's decision invalidating as unconstitutional section 53 of the New York Civil Service Law, which provided for a general disqualification of aliens for employment in the state's civil service, holding that the distinction between citizens and aliens was recognized by the Constitution. "[T]here is no language used in the [14th] Amendment, or any historical evidence as to the intent of the Framers, which would suggest to the slightest degree that it was intended to render alienage a 'suspect' classification, that it was designed in any way to protect 'discrete and insular minorities' other than racial minorities, or that it would in any way justify the result reached by the Court." *Id.* at 649-50; *In re* Griffiths, 413 U.S. 717, 729 (1973) (Rehnquist dissenting from this companion case to *Sugarman* in which the Court struck down Connecticut's exclusion of aliens from the practice of law as violative of equal protection).

58. *See* Trimble v. Gordon, 430 U.S. 762, 777 (1977), in which Justice Rehnquist dissented from the Court's holding that an Illinois law permitting illegitimate children to inherit by intestate succession from their mothers, but not their fathers, was unconstitutional as contrary to the language of the Fourteenth Amendment. In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177 (1972), Justice Rehnquist dissented from the Court's determination that Louisiana's statutory denial of equal recovery rights to dependent unacknowledged illegitimates was constitutionally impermissible, on the ground that rational basis, not strict scrutiny, should have been the standard used. "All legislation involves classification and line drawing of one kind or another. When this Court expands the traditional 'reasonable basis' standard for judgment under the Equal Protection Clause into a search for 'legitimate' state interest that the legislation may 'promote,' and 'for fundamental personal rights' that it might 'endanger,' it is doing nothing less than passing policy judgments upon the acts of every state legislature in the country." *Id.* at 185.

59. "The paramount reason [for the Citizenship Clause of the Fourteenth Amendment] was to amend the Constitution so as to overrule explicitly the Dred Scott decision." Sugarman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting).

cousin of race."[60] Justice Rehnquist believes that if legislative classifications not based on race or national origin are found to have a rational basis, then any change in the legislation is a political question to be left to the legislature and the people, not the Court.[61]

Although the rules of statutory construction, for Justice Rehnquist, are not identical to those of constitutional construction,[62] his textualism is still evident. In construing the language of a statute, the Justice analyzes it in the same manner as the language of the Constitution. He looks to find whether the language used is specific or general. If the language is specific, it must be followed to the letter as it was understood by those who wrote it. If the language is general, it must be read consistently with prior decisions, and within the confines of the intent of the authors.

60. Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

61. Justice Rehnquist sees judicial self-restraint as an implied, if not an express, condition of the grant of authority of judicial review. Furman v. Georgia, 408 U.S. 239, 470 (1972). He therefore has sought to limit access to the courts on both constitutional and statutory grounds. *See, e.g.*, Absence of "Case or Controversy": Rizzo v. Goode, 423 U.S. 362 (1976). Lack of Standing: Orr v. Orr, 440 U.S. 268, 290 (1979) (Rehnquist, J., dissenting); Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972). Absence of State Action: Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Statutory Grounds: Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 573 (1976) (Rehnquist, J., dissenting); Dunlop v. Bachowski, 421 U.S. 560, 591 (1975) (Rehnquist, J., dissenting in part); Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320 (1972). *But see* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (Rehnquist, J., concurring).

Although Justice Rehnquist is a judicial and political conservative, he is not an institutional conservative. His judicial conservatism has been faced with the fruits of the judicial activist Warren Court, and this has led him to overrule a number of past precedents: National League of Cities v. Usery, 426 U.S. 833 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)); Hudgens v. NLRB, 424 U.S. 507 (1976) (overruling Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)); Gosa v. Mayden, 413 U.S. 665, 692 (1973) (Rehnquist, J., concurring in the judgments) (arguing O'Callahan v. Parker, 395 U.S. 258 (1969), should be overruled).

62. It is Justice Rehnquist's view that a constitutional holding is open to re-examination to a greater extent than a question of statutory construction. *See, e.g.*, Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting); Edelman v. Jordan, 415 U.S. 651, 671 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting). In his nomination hearings, Justice Rehnquist took the position that, with respect to statutory construction, *stare decisis* should be given great weight because Congress may change the statute if it determines that the Court misinterpreted congressional intent. On the other hand, with respect to constitutional construction, Justice Rehnquist felt there should be a greater tendency to review prior holdings, since the Court's decision could only be otherwise changed by a constitutional amendment. *Hearings on the Nominations of William H. Rehnquist and Lewis F. Powell, Jr., Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 138 (1971) [hereinafter cited as *Nominations Hearings*].

To Justice Rehnquist's mind, the Supreme Court in *United Steelworkers v. Weber*[63] breached these rules of construction as clearly as it had broken the rules of constitutional construction in the equal protection cases. In *Weber,* the majority of the justices held that Title VII of the 1964 Civil Rights Act,[64] does not prohibit all private, voluntary, race-conscious affirmative action plans. Justice Rehnquist stated that in so holding, the Court confronted and contradicted "clear statutory language,"[65] went beyond allowable limits of embellishing legislative intent,[66] and interpreted the law in a manner wholly inconsistent with the Court's prior decisions.[67]

In his dissent, the Justice analyzed the precise language of the statute[68] and assayed the intent of Congress by studying the legislative history. It was his conclusion that Congress, in passing Title VII, outlawed all racial discrimination.

The majority, however, made use of a more liberal rule of construction which states that ameliorative legislation is to be broadly interpreted by invoking the spirit of that legislation. For Justice Rehnquist, the "spirit" invoked was clearly in conflict with the intent of the legislators.

> Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the words of the statute and, if they are unclear, then to the statute's legislative history. Finding the desired result hopelessly foreclosed by these conventional sources, the Court turns to a third source—the 'spirit' of the Act. But close examination of what the Court proffers as the spirit of the Act reveals it as the spirit animating the present majority, not the 88th Congress. For if the spirit of the Act eludes the cold words of the statute itself, it rings out with unmistakable clarity in the words of the elected representative who made the Act law.[69]

63. 443 U.S. 193 (1979).

64. 42 U.S.C. §§ 2000e-2000e-17 (1976).

65. 443 U.S. at 222 (Rehnquist, J., dissenting).

66. "[O]ur duty is to construe rather than rewrite legislation." *Id.* at 221 (Rehnquist, J., dissenting).

67. "Our statements in *Griggs* and *Furnco Construction,* patently inconsistent with today's holding, are not even mentioned, much less distinguished, by the Court." *Id.* at 221 n.1 (Rehnquist, J., dissenting).

68. "Congress fully understood what it was saying and meant precisely what it said." *Id.* 252 (Rehnquist, J., dissenting).

69. *Id.* at 253-54 (Rehnquist, J., dissenting).

As will be discussed below, however, Justice Rehnquist's mode of analyzing First Amendment problems takes factors other than language into account.

Justice Rehnquist's Contextual Approach to First Amendment Speech

In contrast to the rigid textualism of his approach in most cases involving statutory and constitutional construction, Justice Rehnquist utilizes a contextual approach to First Amendment interpretation. He analyzes the protection of free expression according to the context in which the expression takes place. The labor context is one of many in which Justice Rehnquist and the Court have developed special restrictions on the exercise of First Amendment rights.

This contextual approach considers not only the environment in which the expression takes place, but also the parties and the type of expression involved. This "sliding scale" approach to the First Amendment has been employed in a variety of situations by the Court, which has devised special rules applicable to each. Though Justice Rehnquist many times joins or concurs in these decisions, he tends to prefer a standard of review less likely to result in First Amendment protection.[70]

Justice Rehnquist's limited regard for First Amendment rights was well documented even before he assumed his place on the Court.[71] Since that time, his view of the First Amendment has

70. *See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), in which the Justice seems to have used a rational basis test to denounce as unconstitutional a West Virginia statute which punished the truthful publication by a newspaper of the lawfully obtained name of an alleged juvenile delinquent. *Id.* at 106 (Rehnquist, J., concurring). Justice Rehnquist stated that he could not take very seriously West Virginia's asserted need to protect the anonymity of its youthful offenders when it permitted the electronic media to distribute the information without fear of punishment. *Id.* at 110. He did not agree with the Court's finding that only a state interest of the "highest order" could justify such legislative action. *Id.*

71. "When it comes to dealing with civil liberties, Mr. Rehnquist uniformly takes a position which reflects the low value he places upon concerns of equality and individual freedom. He consistently gives these concerns far less weight than that which they are entitled by their high place in the Constitution of the United States and their vital role in the fabric of contemporary American society." SENATE JUDICIARY COMM. NOMINATION OF WILLIAM H. REHNQUIST, S. EXEC. REP. No. 92-16, 92nd Cong., 1st Sess., at 44 (1971) (minority report).

been made all too clear.[72]

Justice Rehnquist adheres, in his First Amendment philosophy, to the utilitarian rather than the individualist theory of free speech. A person's right to speak exists because of the benefits accruing to society, not because that right is essential to an individual's integrity or personal development. Therefore, the needs of society are heavily favored when balanced against an individual's First Amendment rights. Since societal benefit provides the basis for an individual's rights, the government interest, representing that of society, will generally take precedence.[73]

This is especially true in the area of state law. Justice Rehnquist is of the opinion that not all of the strictures of the First Amendment imposed upon Congress are incorporated by the Fourteenth Amendment.[74] "Given this view, cases which deal with state restrictions on First Amendment freedoms are not fungible with those which deal with restrictions imposed by the Federal Government."[75]

The government, in the role of proprietor, has been allowed greater freedom to regulate expression than it has as a lawmaker. This is particularly true of the government as a school administrator. Speech in schools has had a special status since the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District,*[76] where the Court held that prohibition of expression is constitutionally permissible when it is "necessary to avoid material and substantial interference with schoolwork or discipline."[77] The Court thereby applied the First Amendment in light

72. "It is quite possible, at least in the philosophic sense, to believe thoroughly in the right of free speech, but to have a good deal of doubt about its usefulness." Rehnquist, *Civility and Freedom of Speech,* 49 IND. L.J. 1, 2 (1973).

73. *See* Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law,* 12 GONZ. L. REV. 1 (1976).

74. Gitlow v. New York, 268 U.S. 652 (1925), which imposed the First Amendment on the states through the Fourteenth Amendment, is to be limited, according to Justice Rehnquist, to its factual setting, which involved speech that incited criminal conduct. It is this limitation which aids the Justice in his contextual approach. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part).

75. Buckley v. Valeo, 424 U.S. 1, 291 (Rehnquist, J., concurring in part and dissenting in part). *See also* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 725 (1976) (Rehnquist, J., dissenting) (the First Amendment does not prohibit a state from permitting its civil courts to settle religious property disputes).

76. 393 U.S. 503 (1969).

77. *Id.* at 511.

of the special circumstances of the school environment. This "material and substantial interference" standard is in marked contrast to the "clear and present danger" test[78] which is generally used in cases dealing with constitutionally protected speech.[79]

This conflict between the clear and present danger test and the particularized test of the school environment again reached the Court in *Healey v. James,*[80] in which the denial, by the president of a state-supported college, of official recognition to a student organization which desired to become a chapter of the Students for a Democratic Society was challenged. Although the Court applied the *Tinker*[81] test and found that the student organization did not pose a "substantial threat of material disruption,"[82] Justice Rehnquist, in a concurring opinion, took pains to point out that cases such as *Brandenburg,* dealing with criminal sanctions, were probably inapplicable to special settings such as the academic environment.[83] He further stated that school administrators could impose "reasonable regulations" which would be impermissible if imposed on society in general.[84]

This constitutional distinction between criminal punishment and administrative or disciplinary sanctions was again drawn by

78. Though originally articulated by Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919), and definitively stated by Justice Brandeis in Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), the current clear and present danger test was adopted by the Supreme Court in Brandenburg v. Ohio, 395 U.S. 444 (1969). A state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

79. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

80. 408 U.S. 169 (1972).

81. 393 U.S. 503 (1969).

82. 408 U.S. at 189.

83. *Id.* at 202 (Rehnquist, J., concurring). *See* Ratchford v. Gay Lib, 434 U.S. 1080 (1978). Justice Rehnquist dissented from the Court's denial of *certiorari* in a case concerning a university's refusal to formally recognize a pro-homosexual group as a campus organization. The university based its refusal on the ground that recognition of the group would likely result in imminent violations of state sodomy laws. The Justice held the opinion that homosexuality, which he insinuated may be contagious, constituted a danger which "may be particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood." *Id.* at 1083. The speech and conduct presented by the pro-homosexual group, which, he concluded, had a propensity to induce action prohibited by the criminal laws, "may surely be placed off limits of a university campus without doing violence to the First or Fourteenth Amendments." *Id.* at 1085.

84. 408 U.S. at 203 (Rehnquist, J., concurring in the result).

the Justice in his dissent in *Papish v. Board of Curators of the University of Missouri.*[85] The Court, in a *per curiam* opinion, held that disciplinary sanctions imposed on students because of their distribution of a newspaper containing "indecent speech" on campus, were unconstitutional. Justice Rehnquist argued that because the student's expulsion was an administrative sanction, the Court should have upheld the Board's decision.[86]

This distinction between criminal and noncriminal sanctions was again refused by the Court in *Communist Party v. Whitcomb.*[87] In striking down a state loyalty oath requirement as unconstitutionally overbroad, the Court reaffirmed that *Brandenburg* is to be applied in noncriminal sanction cases.

The second argument made by Justice Rehnquist in *Healey,* that the government, in certain special settings, may impose restrictions on speech which would be impermissible if imposed on all citizens, has been invoked in other contexts.[88]

The Justice's view that the government acting as a proprietor can proscribe conduct which it cannot proscribe as a lawgiver, did not prove persuasive in *Flower v. United States,*[89] where the Court sustained the right to engage in orderly First Amendment activity on "open" military bases which are not otherwise off-limits to the

85. 410 U.S. 667 (1973).

86. *Id.* at 673 (Rehnquist, J., dissenting). Of special note here is Justice Rehnquist's concern for the offensive nature of the language used by the students in their newspaper. Although the regulation of "offensive" words has been prohibited since the Supreme Court's decision in Cohen v. California, 403 U.S. 15 (1971), Justice Rehnquist, along with Chief Justice Burger and Justice Blackmun, has sought to proscribe the use of language which he finds not obscene, but offensive. Relying on the dicta of Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), which states that lewd, obscene or profane language was without constitutional protection, the Justice has continually dissented from decisions which have granted protection to such language. *See, e.g.,* Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Lewis v. New Orleans, 408 U.S. 913 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (Justice Rehnquist, joining Chief Justice Burger's dissent which criticized the prohibition of content regulation as adding "nothing to First Amendment analysis and sacrific[ing] legitimate state interests." 422 U.S. at 224. *But see* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), where a plurality, including Justice Rehnquist, upheld a content regulation contained in a city zoning ordinance which regulated theaters showing non-obscene "adult" motion pictures.

87. 414 U.S. 441 (1974).

88. *See, e.g.,* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (prisons); Greer v. Spock, 424 U.S. 828 (1976) (military bases); American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215 (1974) (wrongful interference with employment); Parker v. Levy, 417 U.S. 733 (1974) (armed forces).

89. 407 U.S. 197 (1972).

general public. In his dissent, the Justice suggested that the governmental interest in the effective operation of a military base was sufficient to justify restrictions on the First Amendment.[90] This position was later adopted in *Greer v. Spock*,[91] where the Court held that the government could refuse to permit citizens to hold a political meeting on a military base.[92]

The special mission of the military has also provided a basis for a special standard of review for military speech. The *Brandenburg* standard has also been held to be inapposite in the military context. The Court has found that the dependence on a command structure within the armed forces, which ultimately involves the security of the nation, requires that speech which undermines the effectiveness of that structure may be regulated more severely than speech within the civilian community. In *Parker v. Levy*,[93] the leading Supreme Court decision on military free speech, Justice Rehnquist, writing for the Court, upheld the conviction by court-martial of an army physician who had urged enlisted personnel to refuse to obey orders to go to Vietnam. In the decision, Justice Rehnquist noted that even revolutionary advocacy is tolerable under the *Brandenburg* test in the civilian community, because it does not directly affect the government in the discharge of its re-

90. *Id.* at 199 (Rehnquist, J., dissenting). This opinion reflects the "pragmatic" view of civil liberties which the Justice had shown as the Assistant United States Attorney General during the May Day demonstrations in Washington, D.C., and the ensuing field arrests. *See Nominations Hearings, supra* note 62, at 43-47.

91. 424 U.S. 828 (1976).

92. *Id.* at 838. This notion that free speech may be regulated more strictly when the government is acting as a proprietor has also been invoked by Justice Rehnquist in the context of free speech within prisons. In Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977), a prisoners' labor union brought an action under 42 U.S.C. § 1983, asserting that its First Amendment rights were violated by regulations promulgated by the North Carolina Department of Correction that prohibited prisoners from soliciting other inmates to join the union from outside sources. Citing *Greer v. Spock*, Justice Rehnquist held that "[a] prison may be no more easily converted into a public forum than a military base." 433 U.S. at 134. Therefore, the prison officials need only demonstrate a rational basis for their regulations.

The rational basis standard used by Justice Rehnquist was significantly less stringent than the standard which has generally been used in the prison speech context. In Procunier v. Martinez, 416 U.S. 396 (1974), the Supreme Court held, with Justice Rehnquist in the majority, that prison regulations restricting freedom of speech are to be upheld if: (1) the regulation or practice in question furthers one or more of the substantial governmental interests in security, order and rehabilitation, and (2) the limitation on First Amendment rights is no greater than is necessary to protect the particular governmental interest involved. *Id.* at 413.

93. 417 U.S. 733 (1974).

sponsibilities. However, the armed forces depend on a system of command that at times must commit men to combat, thereby placing both individual lives and the national security in jeopardy. Therefore, it was held that, under the circumstances, protecting such advocacy must be viewed differently.

> While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[94]

This contextual approach also takes into account the employer capacity in which the government may act. The government as sovereign and lawgiver is to be treated differently than the government as employer; the government may, as an employer, prescribe conditions of employment which might be constitutionally unacceptable if enacted as standards of conduct applicable to the entire citizenry.[95]

Justice Rehnquist is more concerned with the practicalities and efficient operation of government than he is with individual rights. This predisposition has surfaced in the various contexts in which he and the Court have considered speech regulation. He has concern for the individual only so far as the individual affects the system of governance. Nowhere is this more apparent than in the context of public employee free speech.

Even prior to Justice Rehnquist's tenure, the Court indicated that it might be willing to limit the First Amendment rights of public employees in certain contexts. In *Pickering v. Board of Education,*[96] the Court considered a case in which a teacher was dismissed for writing and publishing a letter in a newspaper criticizing the Board's allocation of school funds. The teacher's dismissal was affirmed in the state courts, but the Supreme Court reversed,

94. *Id.* at 758. *See* Brown v. Glines, 444 U.S. 348 (1980) (upholding Air Force regulations requiring prior approval by base commanders of petitions to be circulated on Air Force bases as protecting a substantial governmental interest in maintaining the respect for duty and discipline necessary for military effectiveness).

95. Buckley v. Valeo, 424 U.S. 1, 290 (Rehnquist, J., concurring in part and dissenting in part).

96. 391 U.S. 563 (1968).

holding that although some of the statements in the letter had been shown to be false, when the statements made by the teacher involved matters of public importance, the proper test was that applicable in general to defamatory statements made by citizens against public officials. The Court was careful to distinguish between the teacher as public citizen, and the teacher as employee.

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[97]

After the Court found that the teacher had been acting in the position of citizen, it added:

> We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.[98]

If the speech does not pertain to a matter of public concern and disrupts the work environment or interferes with working relationships, it is no longer given full First Amendment protection. The government is then allowed to react to the speech as an employer.[99] Therefore, if speech is detrimental to the efficient operation of the government, it may discharge the employee as a result of the speech.[100]

As is easily seen, however, there is a possibility of overlap with the present definitions of employee speech. The Court has not yet been faced with speech by a public employee which both pertained to matters of public conern and caused a disruption of the govern-

97. *Id.* at 568.
98. *Id.* at 572.
99. *Id.* at 570.
100. Rehnquist, *supra* note 73, at 12.

mental work force. This will undoubtedly force the Court to evaluate the use of the "matters of public concern" criteria. Such a reevaluation of criteria in the libel law area has resulted in a series of confusing Court decisions.[101]

The *Pickering* test has been adhered to by Justice Rehnquist in his decisions concerning public employee speech. In *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission,*[102] he joined in the Court's decision which found that a nonunion teacher, who spoke at a regularly scheduled open meeting of the board of education, was speaking "as a concerned citizen, seeking to express his views on an important decision of his government"[103] when he discussed pending labor negotiations between the school board and the teachers' union and the undesirability of a "fair share" clause, which would have required all teachers to pay union dues regardless of their membership status. The teachers' union had filed a complaint with the Wisconsin Employment Relations Commission, alleging that the school board, in allowing the teacher to speak at the meeting, was "negotiating" with an individual other than the employee's exclusive collective-bargaining representative, which was a prohibited labor practice. The Court rejected this contention, holding that "[r]egardless of the extent to which true contract negotations between a public body and its employees may be regulated—an issue we need not consider at this time—the participation in public discussion of public business cannot be confined to one category of interested individuals."[104] Thus the Court and Justice Rehnquist were acknowledging that free speech of public employees might be context-sensitive.

In the most recent of the *Pickering* line of cases, *Givhan v.*

101. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), in which the Court disavowed the "public interest" subject matter approach to applying the *New York Times* constitutional malice rule, for a "public figure" status approach, due, at least in part, to a difficulty of defining "matter of public interest."

102. 429 U.S. 167 (1976).

103. *Id.* at 175.

104. *Id. See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (Justice Rehnquist, writing for a unanimous Court, held that a school board's decision not to rehire a public school teacher would be upheld if the board could show it would have reached the same decision even in the absence of protected conduct); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972) (the nonrenewal of nontenured public school teacher's one-year contract may not be based on the exercise of First Amendment rights).

Western Line Consolidated School District,[105] Justice Rehnquist, writing for the Court, held that a public school teacher could not be dismissed from her employment for private communications she had with her principal concerning discriminatory employment policies and practices at the school where she was employed. The mere fact that a public employee decides to express her views privately rather than publicly was held not to lessen the extent of First Amendment protection.[106]

Justice Rehnquist's concern for government efficiency is again apparent in the position he has taken in public employee cases dealing with political patronage. In *Elrod v. Burns,*[107] Justice Rehnquist joined in Justice Powell's dissent.[108] The plurality decision had enjoined a county sheriff's office from discharging non-civil service employees for the sole reason that they were not affiliated with or sponsored by the Democratic Party. The plurality found that patronage dismissals severely restrict political belief and association, and therefore violate the First and Fourteenth Amendments.[109]

Justice Powell's dissenting opinion first questioned whether there was a constitutional question at all. The employees had accepted the patronage jobs with full knowledge of the "tenure" practices of the sheriff's office. "Such employees have *benefited* from their political beliefs and activities; they have not been penalized for them."[110]

The constitutional argument of the plurality was also found by the dissenters to have seriously underestimated the strength of the governmental interest in allowing patronage hiring practices, while exaggerating the perceived burdens on First Amendment rights. Justice Powell argued that the patronage system helps make the government accountable by stimulating political activity and by strengthening parties, especially in local areas where election campaigns for lesser offices generally attract little attention from the media or the public.[111] Any pressure brought to bear on public em-

105. 439 U.S. 410 (1979).
106. *Id.* at 414.
107. 427 U.S. 347 (1976).
108. *Id.* at 376 (Powell, J., dissenting).
109. *Id.* at 372-73.
110. *Id.* at 380 (Powell, J., dissenting) (emphasis in the original).
111. *Id.* at 382-85.

ployees to abandon their beliefs and associations, to secure government employment, was deemed permissible in light of the governmental interests served.[112]

In *Abood v. Detroit Board of Education,*[113] Justice Rehnquist concurred in the Court's opinion which he believed was contrary to the plurality opinion in *Elrod v. Burns.*[114] The Court, in *Abood,* held that public school teachers who were not members of the majority-approved union could be required to pay a service charge to the union for expenditures essential to the collective bargaining process in matters of bargaining, contract administration and grievance adjustment.

The Justice read this decision as allowing the regulation of the nonmembers' political beliefs, as collective bargaining activities of public employees' unions inevitably touch upon political concerns. "I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union."[115]

Justice Rehnquist again joined in Justice Powell's dissent in *Branti v. Finkel,*[116] in which a majority of the Court held that two Assistant Public Defenders, who were neither policymakers nor confidential employees, could not be discharged from their positions solely because of their political beliefs. In addition to reiterating the arguments stated in *Elrod,* that patronage appointments help build continuing stable political parties through the use of a reward system and aid governmental accountability, Justice Powell maintained that government hiring practices are traditionally matters of legislative and executive discretion and should remain so. "Federal judges will now be the final arbiters as to who federal, state and local governments may employ. In my view, the Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials."[117] Such sensitive political judgments, it was argued,

112. *Id.* at 388.
113. 431 U.S. 209 (1977).
114. *Id.* at 242 (Rehnquist, J., concurring).
115. *Id.* at 243-44 (Rehnquist, J., concurring).
116. 100 S. Ct. 1287 (1980).
117. *Id.* at 1298 (Powell, J., dissenting).

"should be left to the voters and to elected representatives of the people."[118]

In the labor context there exists an established governmental interest in preserving industrial peace via a national policy of labor-management relations. Though Justice Rehnquist is at times uneasy with the extent of that policy's impact on state law,[119] he views this settled government interest as providing a substantial basis for the regulation of speech.

Justice Rehnquist's first labor opinion to touch upon First Amendment speech interests, *Windward Shipping Ltd. v. American Radio Association,*[120] did not address the issue.[121] The case involved foreign-flag shipowners and agents who had sought injunctive relief in a Texas state court to bar the picketing of their vessels by American unions protesting the substandard wages being paid to foreign crew members who manned the vessels. The Supreme Court, with Justice Rehnquist writing the opinion for the majority, held that the union's activities did not constitute activity "affecting commerce."[122] Therefore, federal labor law was not applicable and the Texas courts erred in holding that they were prevented from hearing the injunction suit.

Since the majority found there to be no federal jurisdiction, it did not reach the question presented by the unions' First and Fourteenth Amendment defenses. Though the dissent, written by Justice Brennan, directed the state court on remand to adhere to the Supreme Court's decisions in *NLRB v. Fruit & Vegetable*

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118. *Id.* at 1303.

119. *See* notes 6-8 and accompanying text *supra. But see* Carey v. Brown, 100 S. Ct. 2286, 2296 (1980) (Rehnquist, J., dissenting). Justice Rehnquist dissented from the majority's decision which found unconstitutional, under the equal protection clause of the Fourteenth Amendment, an Illinois statute which prohibited the picketing of residences or dwellings, but exempted the peaceful picketing of a place of employment involved in a labor dispute and meeting or assembly places on premises commonly used to discuss subjects of general public interest. The Justice argued that the statute constituted a permissible place restriction, not a content control, and therefore constitutionally furthered the state's interest in protecting residential privacy.

120. 415 U.S. 104 (1974).

121. This is in agreement with Justice Rehnquist's view that federal courts should not resolve cases on the basis of constitutional questions when a non-constitutional ground might be available. *See* United States v. Clark, 445 U.S. 23, 36 (1980) (Rehnquist, J., dissenting); Weinberger v. Wiesenfeld, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result); Arnett v. Kennedy, 416 U.S. 134, 162 (1974); Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local 70, 415 U.S. 423 (1974).

122. 415 U.S. at 105-06. *See also* note 33 and accompanying text *supra.*

Packers, Local 760[123] and *Thornhill v. Alabama,*[124] which provide for First Amendment protection in union picketing, it did not mention the majority's failure to discuss the First Amendment issues.

The decision in *Windward Shipping* was soon affirmed by Justice Rehnquist in *American Radio Association v. Mobile Steamship Association,*[125] a case concerning the same unions engaging in the same conduct as in *Windward,* in an action brought in an Alabama court to enjoin the picketing of a foreign flag ship for substandard wages.

The Court, speaking through Justice Rehnquist, held that neither the shipper, the stevedores, nor the unions were "engaged in or affecting commerce" within the purview of the National Labor Relations Act. Therefore, the picketing did not even "arguably" constitute an unfair labor practice under section 8(b)(4) of the Act, its secondary boycott provision. The Court found that the state court had exercised its proper jurisdiction.[126]

In his opinion, Justice Rehnquist held that the state court injunction did not violate the First or Fourteenth Amendment rights of the picketers. Citing *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*[127] as an enunciation of a balancing test in picketing cases, he proceeded to discuss the competing interests of protected speech and state policy.

The Justice analyzed the union's picketing as "speech-plus" conduct, involving more than mere "publicity." It signals a coercive situation which is a message greater than that printed on the picket itself. The act of picketing then becomes a form of symbolic speech which can be regulated in a stricter fashion than "pure"

123. 377 U.S. 58 (1964).
124. 310 U.S. 88 (1940).
125. 419 U.S. 215 (1974).
126. *Id.* at 228.
127. 354 U.S. 284 (1957). *Vogt* was also relied upon in NLRB v. Retail Store Employees Union Local 1001, 100 S. Ct. 2372 (1980). Justice Rehnquist joined the Court's majority opinion which held that secondary picketing against a struck product, which predictably encourages consumers to boycott a neutral party's business, is prohibited by § 8(b)(4)(ii)(B) of the National Labor Relations Act. 29 U.S.C. § 158(b)(4)(ii)(B) (1976). The cursory dismissal by the majority of First Amendment concerns, reminiscent of Justice Rehnquist's summary consideration of the First and Fourteenth Amendment rights of picketers in *Windward* and *Mobile Steamship,* was declaimed by Justice Blackmun in his concurring opinion. 100 S. Ct. at 2378 (Blackmun, J., concurring).

speech.[128]

In addition to the governmental interest in peaceful labor-management relations, Justice Rehnquist found that the state has an interest in preserving its economy against the stagnation which may result from picketing which disrupts the businesses of employers with whom the picketers have no primary dispute. Using the *Vogt* analysis, the Justice held that "the State may prefer these interests over petitioners' interests in conveying their 'ship American' message through the 'speech-plus' device of dockside picketing."[129]

Once again, by using a standard less stringent than that required in matters concerning the public in general—in this case a simple balancing test which emphasizes the state interest instead of the traditional *O'Brien* test[130]—Justice Rehnquist has restricted speech according to its particular context.

First Amendment concerns in the traditional labor law cases are many times in conflict with state protected property interests. These cases therefore present a situation where Justice Rehnquist's concerns for federalism and property interests are joined with his dispassion for free speech interests. In Justice Rehnquist's jurisprudential universe, property rights take priority over First Amendment rights.[131]

Thus, in *Eastex, Inc. v. NLRB*,[132] Justice Rehnquist, in dis-

128. *See* United States v. O'Brien, 391 U.S. 367 (1968), which held that "speech plus" conduct may be regulated if (1) it furthers an important or substantial governmental interest, (2) the governmental interest is unrelated to the suppression of free expression, and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377. This test forms the basis of many of the contextual tests cited earlier.

129. 419 U.S. at 231.

130. United States v. O'Brien, 391 U.S. 367 (1968). *See* note 128 *supra.*

131. During his confirmation hearings, Justice Rehnquist made the following statement concerning his views on property rights: "I certainly am not prepared to say, as a matter of personal philosophy, that property rights are necessarily at the bottom of the scale. Justice Jackson, for whom I worked, commented shortly before his death that the Framers had chosen to join together life, liberty, and property, and he did not feel they should be separated. I think property rights are actually a very important form of individual rights. On the other hand, I am by no means prepared to say that a property right must not on some occasion—and I am again speaking personally and not in any sense of the Constitution or statutory construction—but certainly when a legislative decision is made that a property right must give way to what may be called a human right or an individual right, that may frequently be the correct choice." *Nominations Hearings, supra* note 62, at 77.

132. 437 U.S. 556 (1978).

sent,[133] argued that the language of section 7 of the National Labor Relations Act conclusively shows that a union's attempted distribution of a union newsletter—which urged employees to oppose incorporation of a state right-to-work statute into a revised state constitution, and criticized a presidential veto of an increase in the federal minimum wage—was not protected "concerted activity" under the "mutual aid or protection" clause of that section.

With an analysis of the National Labor Relations Act which was reminiscent of his equal protection analysis,[134] Justice Rehnquist stated:

> It may be that Congress has power under the Commerce Clause to require an employer to open his property to such political advocacy, but, if Congress intended to do so, "such a legislative intention should be found in some definite and unmistakable expression." [citation omitted] Finding no such expression in the Act, I would not permit the Board to balance away petitioner's right to exclude political literature from its property.[135]

The property interest involved in *Eastex* cannot be regulated, according to the Justice, unless a definite and unmistakable congressional intent to do so is found. Justice Rehnquist emphasized that the state law of trespass should be applied, allowing the property owner to determine what political advocacy he would admit onto his property.

The Justice found that, traditionally, the Court had recognized the weight of an employer's property rights which are "explicitly" protected from "federal interference" by the Fifth Amendment. "The Court has not been quick to conclude in a given instance that Congress has authorized the displacement of those rights by the federally created rights of the employees."[136]

It was acknowledged that this protection of employer property rights allowed for two exceptions. Under the first, property rights of employers could be displaced where necessary to accommodate the rights of employees to distribute union organizational literature and to wear union insignia. Under the second exception, nonemployees could also invoke the right of self-organization to solicit union membership, but the National Labor Relations Board's au-

133. *Id.* at 579 (Rehnquist, J., dissenting).
134. *See* notes 56-62 and accompanying text *supra.*
135. 437 U.S. at 583 (Rehnquist, J., dissenting).
136. *Id.* at 580.

thority to displace the employer's property rights in such circumstances was extremely limited.

Justice Rehnquist, citing a footnote from the Court's opinion in *Hudgens v. NLRB*,[137] in which he had joined, found there to be a substantial difference in employer rights depending on the character of the person carrying out the organizational activity.[138] If the activity is by employees, then the employer's managerial interests are involved, as the employees are already rightfully on the employer's property. However, if the organizational activity is conducted by nonemployees, a different balance is struck because the employer's property rights are now involved. When property rights are involved, the right of self-organization, guaranteed by federal statutory law, is very limited when balanced against the constitu-

137. 424 U.S. 507, 521-22 n.10 (1976).

138. This prioritization of constitutional rights according to the characterization of the actor is a view taken by Justice Rehnquist in the area of corporate free speech as well. In First Nat'l Bank v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting), the Justice categorizes corporations into three types: (1) media corporations, (2) political corporations, and (3) economic corporations. He would vary the amount of protection given to corporate speech according to which type of corporation is speaking. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 100 S. Ct. 2326, 2329 (1980) (Blackmun, J., dissenting) (Justice Rehnquist partially joining Justice Blackmun's dissent in cases prohibiting the regulation of political inserts in utility bills). This categorization—in addition to his varying scrutiny of speech content in commercial speech, *see, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 100 S. Ct. 2343, 2360 (1980) (Rehnquist, J., dissenting); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting), and offensive speech, *see, e.g.*, note 86 *supra*—indicates the broadening of Justice Rehnquist's contextual approach to the First Amendment. In a recent non-labor case, Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035 (1980), the Court was faced with issues which were the mirror-image of those expressed in *Eastex*, pitting state rights of free expression and petition against federal property rights. In *Pruneyard*, the Court affirmed a California Supreme Court decision which held that the distribution of pamphlets and the circulation of petitions concerning a United Nations resolution against "Zionism" by high school students were activities protected by the California Constitution, even in privately owned shopping centers.

Writing for the Court, Justice Rehnquist found that California had a sovereign right to "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 4652. The Justice's fundamental concern for property rights, which was so forcefully expressed in *Eastex*, was minimized when in conflict with his notion of an elevated state position in the federal constitutional framework. Hudgens v. NLRB, 424 U.S. 507 (1976), and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), were distinguished by the fact that no state-created right to use of private property by strangers existed in those cases.

The exercise of the state-protected rights of free expression and petition on the shopping center property was held neither to constitute an unconstitutional infringement of the shopping center owner's property rights under the taking clause of the Fifth Amendment, nor a violation of the property owner's First Amendment rights.

tional property right of the employer. In Justice Rehnquist's eyes, the rights of the organizers are based on statute alone. First Amendment protection of free expression does not enter into the balance.

Justice Rehnquist's position, therefore, was that the intrusion on the property rights of the property owner was not minimal at all, as was claimed by the majority. The required opening of the private property of an employer to political advocacy was deemed to be a contravention of Fifth Amendment property rights which should not fall before the First Amendment rights of nonemployees.

Conclusion

Justice Rehnquist, due to his concern for the states' role in the federal system and for basic property rights, has consistently undermined the protection of First Amendment speech. Through the use of his extreme contextual approach to the regulation of speech, he has placed too great an emphasis on the protection of the corresponding governmental interests arising in the various contexts. At the same time, his selective textualism has attempted to raise property rights to a pre-eminent position in the constitutional scheme. As a result the freedom of speech, which traditionally has occupied that position, is endangered.